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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 587

ADDISON E. McCOY AND SARA S. McCOY,
Petitioners,

vs.

HOLLY HILL LUMBER COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND BRIEF IN SUPPORT OF PETITION.

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Addison E. McCoy.

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No. 587

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vs.

HOLLY HILL LUMBER COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF SOUTH CAROLINA

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Addison E. McCoy and Sara S. McCoy, respectfully present to this Court their petition for a writ of certiorari addressed to the Supreme Court of the State of South Carolina, commanding said court and the clerk thereof to certify to this Court the record and proceedings of the case in said court wherein your petitioners were appellants and the Holly Hill Lumber Company, Inc., a corporation under the laws of the State of South Carolina, was respondent, together with its opinions therein, for the review and determination of said cause by this Court.

Summary and Statement of Matter Involved

The case involves the question as to whether there should be specific performance of an option procured by the plaintiff corporation for $10.00 from the defendant Addison E. McCoy to purchase a tract of 560 acres in Orangeburg County, South Carolina, at an agreed purchase price of $10,000.00.

The defendant Addison E. McCoy admits the execution and delivery of the option, but defended upon several grounds, mainly that the option was obtained through the fraud and misrepresentation of the plaintiff, and that the purchase price is so grossly inadequate as to render the contract unconscionable. The gist of the defense is that there is a large and valuable limestone or marl deposit on the tract of land in question which lies from six to fifteen feet beneath the surface; that the defendant, who lives about thirty five miles away from the property, was ignorant of this fact when the option was given; that the plaintiff was fully apprized of the existence of the lime bed; and not only concealed this knowledge from the defendant, but made false representations thereabout which in effect lulled him to sleep.

In its first decision the State Supreme Court held against the petitioner, Addison E. McCoy's, contention of fraud. The Court, however, recognized the basic principle of one of the other defenses—that a Court of Equity should not and will not enforce specific performance of an unconscionable bargain; but avoided its enforcement by asserting that the property was not worth more than the $10,000.00 offered for it; and while affirming, destroyed the finality of this first decision by stating in its rejection of the defendant's suggestion that the dower interest of the defendant's wife would be outstanding, and he unable to give the good and marketable title which he contracted to give, that they

would not attempt to meet a situation which was not then before them; that there was then no evidence that the wife would refuse to renounce dower; and that if such situation should develop, the parties would doubtless seek an appropriate remedy in the lower Court. It did develop and a remedy was sought by the plaintiff which brought on the second appeal by the husband, Addison E. McCoy. The wife, Sara S. McCoy, was not a party to the contract, did not execute same; and, on the contrary, refused to renounce her dower right under the circumstances present of fraud, over-reaching, deceit, and effort by plaintiff to enforce a totally unconscionable and inequitable bargain it had procured because of the ignorance of her husband about the limestone deposit. His second appeal resulted in a remand to the Circuit Court for further proceedings, among which was to bring in the wife, Sara, as a party to case, in which she had not theretofore participated. Upon this being done, the Circuit and Supreme Courts barred and divested her of her dower, without her signature or consent, and over protest, in violation of all modes of barring dower provided by statute or otherwise in South Carolina; and, we believe, without precedent. This was strenuously resisted as a violation of her right to due process of law and the equal protection of the laws under the Constitution of the United States. Meanwhile, other Federal constitutional questions had been duly raised on the record by both of these petitioners, and were decided adversely to them by the Court of last resort in the State. It is upon the basis of these questions that this petition is presented.

Jurisdictional Statement

The Grounds upon which it is contended that this honorable Court has jurisdiction of this case will be amplified in the subjoined brief, replete with authorities, reference

to which is craved; but here will be outlined in condensed form. It is respectfully submitted that the Court of last resort in the State of South Carolina has decided Federal questions of substance not heretofore determined by this Court, or has decided them in a way probably not in accord with applicable decisions of this Court, to wit: Under the U. S. Constitution we challenge the right and power of the Court to vest, as they have done in this case, the dower right of the wife without her signature or consent in the purchaser of real estate from the husband by mere judicial decree, in violation of the statutory and common law rules that her dower can *only* be divested by her voluntary renunciation before, and after private and separate examination by an officer competent to administer an oath, to determine whether her renunciation has been given "freely, voluntarily and without any compulsion, fear or dread of any person whomsoever". See statutes cited and quoted in the subjoined brief. The question of due process of law is directly involved; and presents a matter of public importance.

A rigid line of cases had theretofore consistently held that dower can *only* be renounced in the manner provided by statute.

Ex parte Clark, 130 S. C. 501, 126 S. E. 137.
Gainey v. *Anderson*, 87 S. C. 47, 68 S. E. 888.
Moon v. *Bruce*, 63 S. C. 126, 40 S. E. 1030.
McKenzie v. *Sifford*, 52 S. C. 104, 29 S. E. 388.

The authorities cited in the subjoined brief will unquestionably show that no case has been specified by the Court or Counsel which has forced a wife to *involuntarily relinquish* her dower right; and that in all of the reported cases in South Carolina and elsewhere the question has been whether there should be an abatement from the purchase price of the value of the wife's dower interest if she refuses to relinquish

her right, or an indemnity against it; and some have gone to the exact opposite of what was done in this case by holding that the wife's refusal defeats the action for specific performance altogether; as, for example, the leading decision by the Court of Appeals of the District of Columbia in the case of *Reilly* v. *Cullinane*, 287 Fed. 994.

We respectfully submit that a substantial Federal question is presented by this matter, based on the following propositions, to wit:—

(a) Mrs. McCoy having never signed the contract, and having refused to give her consent to the relinquishment of her dower, is suffering a taking of her private property without her consent for private use. That this is a denial to her of due process of law under the Federal Constitution, see 12 C. J. 1252, sec. 1042, and what this honorable Court has said in *Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. Ed. 780, 790, 18 S. Ct. 383, to the effect that "due process of law" implies a conformity with natural and inherent principles of justice, and forbids that one person's property shall be taken for the benefit of another."

(b) This has been a taking of one person's property and giving it to a corporation, "contrary to settled usages and modes of procedure." Compare 16 C. J. S. 1375, sec. 647 and *Ochoa* v. *Hernandez Y. Morales*, 230 U. S. 139, 161, 57 L. Ed. 1427, 1437, 33 S. Ct. 1033.

And the fact that Mrs. McCoy was brought into Court and given an opportunity to be heard, does not satisfy the requirements of "due process of law."

Chicago, B. & Q. R. v. *Chicago*, 166 U. S. 226, 234, 235, 41 L. Ed. 979, 984, 17 S. Ct. 581; and *Fayerweather* v. *Ritch*, 195 U. S. 276, 297, 49 L. Ed. 193, 209, 25 S. Ct. 58; from which decisions we will quote in the brief.

It will be shown by competent authority in the subjoined brief that the State Court may not through judicial

decrees violate the due process and equal protection of the laws clauses of the 14th Amendment to the United States Constitution; that inchoate dower can not be divested by a judicial sale or decree, except to satisfy a lien which existed before the dower attached; that the United States Supreme Court has held that a gross sum in lieu of dower can not be allowed by a court of chancery, unless by consent; that it is a valuable interest that the wife can not be compelled to resign; and that the Courts of South Carolina have distinctly held that inchoate dower is a substantial right of property, recognized by the statutes and common law of South Carolina.

A Statute attempting to divest dower and substitute money or security has been held unconstitutional. *Talbot* v. *Talbot*, 14 R. I. 57. Other cases have held it to be within the protection of the constitution. (*Wheeler* v. *Kirtland*, 27 N. J. Eq. 534.)

We respectfully dissent from the statement in the last opinion of the Supreme Court that Courts have been divesting the dower interests of married women for many a day in order to compel the specific performance of the contracts of husbands. No case that we have found has done that prior to this one. Abatements of the purchase price, or securing a part of the purchase money as an idemnity against the dower are all that the references to A. L. R. cited by the Court support. The authorities show that money can not be substituted for the dower *in kind*, hence the Court is wrong in its idea that the dower is transferred from the real estate to the fund.

Your petitioners would also further show that the State Courts (including that of last resort), although divesting her of her dower right because of a contract alleged to have been made by her husband, to which she was not a party, have expressly denied her the right to show that

such contract was procured by fraud—this being another basis upon which it is claimed that she has been deprived of her property without due process of law and in denial of the equal protection of the laws. In her answer Mrs. McCoy pleaded fraud in the procurement by the plaintiff of the contract (R. 14). Plaintiff demurred to it (R. 15). The Circuit Court sustained this demurrer and struck out this plea (R. 18). She resisted this on the ground that it violated her Federal Constitutional right to due process and the equal protection of the laws under the 14th Amendment. See Exception 2 on 3rd Appeal (R. 169), and the statement on page 168 that each and every point made by the Exceptions was made and fully argued in the Court below. The order sustaining the demurrer was upheld on appeal (R. 423), the Court making it clear, however, that all constitutional questions are sufficiently in the record. It seems obvious that this action on the part of the State Courts is not in accord with the applicable decisions of this Court in numerous cases holding "that no one shall be condemned in his person or property without an opportunity of being heard in his own defense," such as *Holden* v. *Hardy,* 169 U. S. 366, 391, 42 L. Ed. 780, 790, 18 S. Ct. 383; and *Ochoa* v. *Hernandez Y. Morales,* 230 U. S. 139, 161, 57 L. Ed. 1427, 1437, 33 S. Ct. 1033.

In South Carolina under its constitution a married woman is separate and distinct from her husband in legal rights, and has a separate estate. Her dower right is held to be independent of the husband *and is against him.* Authorities in subjoined brief.

In its second decision, (R. 411) the State Supreme Court indicated that it would be necessary to try the matter of the value of the limestone deposit, not only for the sake of determining the value of the dower in relation to Mrs. McCoy, but on the fundamental issue as to whether the

alleged contract was enforcible against the husband, Addison E. McCoy. The Court said in part, apparently without consistency with its first decision:

> "The determination of the value of the property in question is an issue foreign to any of the issues heretofore disposed of, and such determination must be reached through the judicial processes that are encompassed within the common law and constitutional doctrine of due process of law."
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> "We recognize that the suggested procedure (of bringing the wife into the cause) will prolong this litigation, *and perhaps give rise to an opportunity to defeat the decree of specific performance by establishing a value for the property in question which might give the inchoate right of dower a value so far in excess of the proportionate part of the contract price as to deprive the respondent of the benefit of its contract.*" (Emphasis added)

Clearly what was meant was that if, as the Appellant Addison E. McCoy contended and argued, the value of the property was shown to be for example $60,000.00 and the rule of valuing the dower was 1/6, then the 1/6 would be $10,000.00; and, to set aside that much to protect against the dower would absorb the entire contract price and defeat the entire contract. Certainly, Addison E. McCoy had an interest in establishing that; and, was, therefore, entitled to a further status as a litigant.

The Court moreover, having cited two conflicting rules in South Carolina for evaluating the dower, and having said that they do not purport to lay down any definite rule by which the valuation shall be reached, reinforces the conclusion that Addison E. McCoy was to have a further status as a litigant with the following pronouncement:—

> "If in the further stages of the controversy, there can be evolved a method of computation that can be

shown to be more equitable in the light of the particular facts of this case than either of the rules hereinbefore referred to, the case is open for further consideration of that particular problem. *In such further consideration, the appellant* (Addison E. McCoy), *the respondent* (Holly Hill Lumber Co., Inc.) *and the appellant's wife each will be entitled to be fully heard.*" (Emphasis added)

A method not only more equitable, but more logical, and, if it had had the sanction of the Courts, more *legal,* was evolved and argued, to wit: that the dower was to be valued by the mortuary tables and valuation of an interest in property at less than an estate in fee, as enacted into law by the Legislature of South Carolina, with the result that in this case this particular dower should have been valued at one-fourth, instead of the one-sixth adopted by the court from some obsolete cases. But Addison E. McCoy was ruled out as a litigant by the Order of his honor, Judge Gaston of the Circuit Court, dated October 4, 1943 (R. 16). *This action was taken without any previous notice of it.* The matter was up before his Honor on motions for an Order of Reference and to frame issues to a jury. It was duly resisted on Federal constitutional grounds as the Order itself shows. These grounds were also raised by the 3rd Exception on the 3rd appeal to the State Supreme Court and were duly argued; but overruled.

After the Circuit Court had so deprived Addison E. McCoy of any rights as a litigant and had striken out on demurrer, the plea of his wife, Sara S. McCoy, of fraud on her rights, the case was tried once more on Circuit. This time, as the "Final Order" of his Honor, Judge Gaston of the Circuit Court plainly shows, between the evidence offered by plaintiff and defendant, respectively, the issue was marked and definite. There was no middle ground under the evidence (R. 32). The subject of dispute was an unde-

veloped limestone bed, lying beneath the surface of the earth. The plaintiff sought to show its value by the testimony of inexperts, mostly farmers, with knowledge only of the surface uses of the property, for agriculture, timber purposes and the like. This line of evidence was strenuously objected to as incompetent; because the valuation of a limestone deposit below the surface of the earth was solely a matter of scientific knowledge, or experience in the limestone industry; it being submitted that the only competent evidence admissible was such as that on which the defendants relied. Mrs. McCoy offered men learned about the subject and distinguished in that field of scientific activity, such as Dr. F. H. H. Calhoun, Dean of Geology at Clemson College, S. C., Ellis C. Soper, a mining engineer of international distinction, one time connected with the Edison Cement Company associated with the great inventor, Thomas A. Edison; Roy Reddie, a practical mining engineer of international activities, now operating a large Limestone Quarry at Gaffney, S. C., and Prof. J. Lincoln Moore, Chemical Engineer and prospector for the South Carolina State Defense Council. The Supreme Court says that the opinions of these men on the value of this property ran to $100,000.00 and more. Mr. Soper, for example, gave it an *annual* royalty value of from $15,000.00 to $18,000.00. Engineer Reddie said the McCoy property would be a gift at $200.00 per acre (R. 124, f. 479). The trial judge referred laudably to this witness in his Order (R. 28, f. 96). He credits him with being a mining engineer of world wide experience and qualifications; and said that Mr. Reddie on a royalty basis esimates the McCoy land at 3 cents per ton, or $2,400.00 per acre (R. 29, f. 98). Yet the same trial judge disregards entirely all of this evidence and abruptly, and without any apparent reason, holds that in his opinion the fair market value of the McCoy land

in 1941 is $10,000.00 under the testimony (R. 43, f. 155)! The State Supreme Court apparently decides this important issue with the following fiat:

> "Considering the whole of it, this Court is satisfied that the long-experienced trial Judge reached a just and equitable decision when he fixed the value of the property at the time of sale at $10,000.00, and it will be affirmed" (R. 427).

It discounts a binding written offer appearing in the record at pages 187 to 189, incl., by the President of the Volunteer Portland Cement Company of Knoxville, Tenn., to purchase the identical property for $25,000.00.

The action of the Court in not being controlled by the scientific evidence seems to us to be not in accord with such applicable decisions of this Court as *Montana Ry. Co.* v. *Warren,* 137 U. S. 348, 34 L. ed. 681, 11 S. Ct. 96.

Even if it be said that these holdings of value and utter disregard of the only evidence to which weight should have been given on that issue are non-Federal grounds of decision, they are so utterly without any fair or substantial support in authority or reason and so plainly untenable that they can not serve to prevent review by this Court, there being other admittedly Federal grounds involved.

Ward v. *Love County,* 253 U. S. 17, 40 Sup. Ct. 419, 64 L. ed. 751, 758;

Creswill v. *Grand Lodge K. of P.,* 225 U. S. 246, 261, 50 L. ed. 1074, 1080, 32 S. Ct. 822;

Terre Haute and I. R. Co. v. *Indiana,* 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 S. Ct. 767.

There are also other substantial Federal questions in this case, as to which the review and adjudication of this honorable Court is sought. One of these is that the Circuit Court, with the concurrence of the Supreme Court of the

State has by decree ordained a mechanism for debarring Mrs. McCoy's dower that violates her husband's Federal constitutional rights, as we conceive them. It was decreed that the portion of the purchase money that was to be withheld against the dower was to be secured by a mortgage carrying a clause as follows:

> "And Further, that in the event the said wife survives the Defendant, the Plaintiff will, upon death of Defendant, pay the said sum to his wife with any accrued interest." (R. 215).

Unless the dower can be barred outright by the plaintiff paying the whole sum into Court as it is now apparently attempting to do (R. 419), but which we contend is not constitutionally possible, some device of mortgage like this would have to be resorted to; but, in this form, as contended throughout by the separate Counsel for the husband (R., pp. 223, 224) *his* constitutional rights are thereby violated. This is obvious because the money would not belong to her, but, after his death, to *his* estate on account of the liability of the latter under the general warranty of the deed involved (R. 223). Principles of subrogation would come into play; for if she may recover the dower in kind, the Lumber Company would have its remedy under the general warranty; and the estate of the husband would have to answer on that; entitling it by the equitable principles of subrogation to the withheld and secured money, since she will have her dower in land and can not have both the land and the money.

Under Article 17, Section 9 of the Constitution of South Carolina, 1895, a married woman enjoys a separate estate from her husband; hence the fact of marriage can not bear upon these respective rights and liabilities. To take the money, which is the property of *his* estate, and thus give

it to her, deprives him of his property without due process of law. This has been contended throughout the case.

Again, we respectfully present to this honorable Court a substantial violation of Addison E. McCoy's Federal constitutional rights, and a taking of his property without due process of law in violation of the Fourteenth Amendment, in the fact that the State Supreme Court has never passed upon certain vital points of his defense which were duly presented to them, and which by the express terms of the Constitution and laws of the State of South Carolina, they were required to decide.

In the subjoined brief we will cite and quote from the constitution and statute of South Carolina and decisions of this Court (e. g. *Fayerweather* v. *Ritch*, 195 U. S. 276, 49 L. ed. 193, 25 S. Ct. 58) and other Courts to show that this was and is a denial of due process of law as guaranteed by the 14th Amendment of the United States Constitution.

There were several points so raised by your petitioner and argued by his Counsel, but passed over by the Court; their omission being in each case brought to their attention by proper exception thereafter; but we will trouble this honorable Court with only one of them, because it bears on the vital question of fraud.

The Honorable Supreme Court of South Carolina did not decide the point raised by the fourth exception on the first appeal thereto, that the main basis upon which fraud was claimed by the defendant was that

> "The plaintiff in procuring the option represented to the defendant that 'elbow room' was wanted, inducing the defendant to believe that it was expanding plaintiff's large saw mill operation adjoining defendant's place, and beclouding and concealing from him the vital fact of the presence under the surface of the property of a large and highly valuable deposit of limestone or marl," etc.

The following is the nearest approximation of the Court to the point in issue. We quote from the opinion (23 S. E. (2nd) 378, Headnotes 9 and 10):

> "While the rules of equity which we have hereinabove stated, as they relate to fraud and concealment on the part of a vendee, are generally recognized and accepted by the Courts, it is agreed that an informed vendee must limit himself to silence in order to escape the imputation of fraud. If in addition to the party's silence there is any statement, even in word or act on his part, which tends affirmatively to a suppression of the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, the line is overstepped, and the concealment becomes fraudulent.
>
> "It is upon the foregoing principle of equity that the defendant largely relies, and he points to the following testimony as being conclusive to show fraud. When the defendant, Mr. McCoy, was being cross-examined, this testimony was elicited:
>
> " 'Q. Counsel asked Mr. Miller if he did not tell you when he was trying to get the option, if he told you it (Atlantic Lime Corporation) was in the hands of the receivership?
>
> " 'A. Yes. I asked him "How about that lime plant?" He said, "Don't think it will amount to anything, it is in the hands of the receiver." I had a vague idea about the lime plant.'
>
> "It is argued that this testimony shows that Mr. Miller overstepped the line, affirmatively suppressed the truth, and was guilty of concealment amounting to fraud. But this deduction escapes us."

No wonder the deduction escaped; because there was no exception that hinged the charge of fraud upon the conversation about the lime plant. That was a mere incidental and secondary matter. The fourth exception on the first appeal (R. 157) had no reference whatever to the Atlantic

Lime Corporation or its receivership; but charged error in failing to find fraud, concealment of essential facts and over-reaching on the part of the plaintiff in obtaining the option; "because the undisputed evidence shows that plaintiff in procuring the option represented to the defendant that 'elbow room' was wanted, inducing the defendant to believe that it was for expanding plaintiff's large sawmill operation adjoining defendant's place, and beclouding and concealing from him the vital fact of the presence under the property of a large and highly valuable deposit of limestone or marl, which was further concealed by failing to mention it, or the right to prospect for it on the place, in the option form prepared in advance by plaintiff, although the plaintiff soon thereafter surreptitiously trespassed on defendant's said property and bored for lime; all of which induced the defendant to give plaintiff the option at the grossly inadequate price of $17.85 per acre; although it is indisputably shown that plaintiff had advance knowledge of the existence of large lime deposits there and thereabouts and of the activities of the State Council of Defense in prospecting and procuring in that area options for lime purposes ranging from $50.00 to $400.00 per acre; and, as all this was unknown to defendant, the statements made by plaintiff had the effect in law and equity of creating a duty on the plaintiff of making a full disclosure of the facts, which were withheld in the knowledge that if revealed the option would not have been given."

We shall in the brief subjoined to this petition show by reason and authority that the facts from which the above outline was condensed constitute in law and in equity such a fraudulent status as to have defeated plaintiff's demand for specific performance. The Court, instead, hinged its position on a mere incidental conversation about the Atlantic Lime Corporation which was not touched on in the defendant's exception as to fraud. This omission of a tre-

mendously important issue can amount to nothing less than a deprivation to this defendant of his Federal constitutional right to "due process of law", without which his property can not lawfully be taken from him.

The values of this property proven at the last Circuit trial by the only witnesses competent to value it—the mining engineers and other professional witnesses—and the fact that on the adjoining property there is being set up a plant to cost around ten million dollars (R. 153) for extracting alumina from this limestone will bring out to the Court that the defendant's claims were not fantastic, were not based on conditions which did not or could not exist, and the extent to which the subtlety of the plaintiff deceived him.

All of the constitutional questions now presented by either of the petitioners were duly set up in the State Courts. Any doubt about this is dispelled by the following statement appearing in the last opinion of the State Supreme Court:

> "One of the supposed issues presented is whether the constitutional questions raised, relating also to the Federal Constitution, have been preserved for possible review by the Supreme Court of the United States, if sought by appellants. Of course, our opinion is our own and does not bind that high Court, *but we think that such questions are sufficiently in the record for the purpose stated.*" (R. 425.) (Emphasis added.)

Reasons Relied On for the Allowance of the Writ

The reasons relied on for the issuance of said writ and upon which your petitioners believe that a writ ought to be issued, may be summarized as follows:

The state court has decided federal questions of substance not theretofore determined by this court, or has decided some of them in a way probably not in accord with

applicable decisions of this court; and has decided against certain rights and privileges specially set up or claimed by your petitioners under the Constitution of the United States, that is to say:

1. The statute and common law of South Carolina having provided the exclusive machinery for the barring of the dower of a mentally competent wife by her separate examination by and voluntarily renouncing her dower before an officer competent to administer an oath, it was a violation of the due process and equal protection of the laws clauses of the Fourteenth Amendment of the United States Constitution for the state courts to have barred such a dower by mere judicial decree in an action against the husband for specific performance of an alleged contract in which wife had not joined, and she having refused to give her consent to renounce the dower.

2. The action of the state courts in denying such wife the right to set up and prove fraud in the procurement of the alleged contract, which resulted in her dower right being taken away from her without her consent, was a taking of her property without due process of law and a denial to her of the equal protection of the laws in violation of the Fourteenth Amendment, Section 1, to the Constitution of the United States.

3. This suit was originally brought against the husband alone for specific performance. On his appeal from an adverse decree, the State Supreme Court remanded the case for further proceedings; wherein the Court said that its directing the wife to be made a party would perhaps give rise to an opportunity to defeat the decree by establishing a value for the property so far in excess of the proportionate part of the contract price as to deprive respondent of the benefit of its contract; and that in the further consideration

of the method of computing the value of the dower the appellant, the respondent and the appellant's wife each would be entitled to be fully heard. Pursuant to this an amended summons, requiring him to answer, was served upon the husband; to which he duly filed answer setting up defenses, but the Circuit Court then made an order without notice denying the husband any further status as a litigant. It was contended by him that this order denied him due process of law and the equal protection of the laws in violation of the 14th Amendment to the United States Constitution; and it is now contended that its affirmance does deny him such rights and privileges guaranteed by that Amendment.

4. In trying the matter of the value of this sub-strated deposit of limestone or marl, the issue was marked and definite as to the evidence offered by the respective sides. Plaintiff depended principally on lay witnesses, mostly farmers whose knowledge was limited to surface purposes, such as agriculture and timber; whereas the defendants relied on professional witnesses, such as mining engineers and scientists, who alone were competent. The valuation decided on ignored the latter, and set a figure that was so lacking in any fair or substantial support in the competent evidence and in authority and reason that its non-Federal nature will not prevent a review by this honorable Court, there being other Federal questions involved.

5. The State Court's action of ordering a part of the purchase price set aside as an indemnity against the dower claim of Sara McCoy and securing it with a mortgage providing that if she survives her husband, the money be paid to her; deprives her husband of his property without due process of law, because that money will not belong to her, but his estate, on account of the latter's liability under the general warranty in his deed.

6. The judgments rendered in this cause are illegal since the petitioners have thereby been deprived of due process of the law and the equal protection of the laws as guaranteed by the Fourteenth Amendment, Section 1, of the United States Constitution; because the honorable Supreme Court of South Carolina did not decide a vital point raised by the fourth exception on the first appeal in this case, that the main basis upon which fraud was claimed by the defendant was that

> "The plaintiff in procuring the option represented to the defendant that 'elbow room' was wanted inducing the defendant to believe that it was expanding plaintiff's large sawmill operation adjoining defendant's place, and beclouding and concealing from him the vital fact of the presence under the surface of the property of a large and highly valuable deposit of limestone or marl," etc.;

which point was made and definitely stated in the cause and fairly arose upon the record, but was not decided as required by Article V, Section 8, of the Constitution of South Carolina, and by Section 27 of its Code.

Your petitioners further state that said Supreme Court of South Carolina is the highest court in and of the State of South Carolina in which a decision in this suit could be had, and that its judgments involve Federal questions, the last of which being the final judgment on all of the matters herein referred to within the State of South Carolina; and these petitioners aver that these judgments are erroneous, and that this honorable Court should require the cause to be certified to it for review and determination.

Your petitioners fully amplify their grounds for requesting that a writ of certiorari be ordered herein in and by their brief, which is subjoined to this petition, reference to which is craved, and in which we will, we respectfully submit, demonstrate, upon valid authority and reason, the

grounds of Federal jurisdiction, and the right and necessity of this case being heard and adjudicated by the Supreme Court of the United States.

Your petitioners include in their brief copies of the constitutional and statutory provisions of the State of South Carolina which are referred to in the foregoing petition, and this honorable Court is requested to refer to the same whenever necessary, and that the same be deemed a part of this petition.

Your petitioners present herewith a certified copy of the entire record in this cause, including the proceedings in the Supreme Court of South Carolina, and the opinions of said court, and of the finality of its judgment; and state that the record below reposes in said court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court directed to the Supreme Court of the State of South Carolina, sitting at Columbia, S. C., commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of South Carolina had in said cause, to the end that the cause may be reviewed and determined by this honorable Court as provided by law, and that said judgments of the Supreme Court of South Carolina may be reversed by this honorable Court, and for such further relief as may be proper.

And your petitioners will ever pray.

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Counsel for the Petitioner
Sara S. McCoy.

M. W. SEABROOK,
Sumter, S. C.,
Counsel for the Petitioner
Addison E. McCoy.

BRIEF OF PETITIONERS ON APPLICATION FOR WRIT OF CERTIORARI

Opinions Below and Dates Thereof

(1st) Filed December 21, 1942, 201 S. C., 427; 23 S. E. (2nd) 372.

(2nd) Filed June 14, 1943, 203 S. C. 59, 26 S. E. (2nd) 175, 148 A. L. R. 285.

(3rd) Filed July 13, 1944, 30 S. E. (2nd) 856.

Jurisdictional Statement

(a) *Statutes, etc. Involved.*

Section 8579 of the Code of South Carolina, 1942, provides the only method by which a wife's dower may be renounced and barred, except in the few instances hereinafter mentioned, this section being worded as follows, to wit:

> "Sec. 8579. How dower renounced and barred.—The wife of any grantor conveying real estate by deed of release may, whether she be of lawful age or a minor, release, renounce, and bar herself of her dower in all the premises so conveyed, by acknowledging, as prescribed in the preceding section upon a private and separate examination, that she did freely and voluntarily, without any compulsion, dread or fear of any person whomsoever, renounce and release her dower to the grantee, and his heirs and assigns, in the premises mentioned."

The "preceding section" referred to, No. 8578, prescribes the officials before whom the renunciation may be made and the procedure. Section 8581 gives the form.

The only other provisions for barring dower are not involved here, but are as follows:

Section 8582, where wife accepts a distributive share in her husband's estate.

Under Section 8583, elopement forfeits dower.

Section 8584—deserting husband without cause forfeits dower.

Sections 8586 to 8590 provide for jointure excluding dower.

Section 8591 provides that dower is barred upon wife obtaining divorce.

Under 8594 marriage to another man bars dower.

Sections 8597 to 8602 are the only statutory provisions for barring dower by adjudication, and they relate solely to insane married women—a status not involved here.

There has been a consistent line of decisions in South Carolina to the effect that dower can *only* be renounced in the manner prescribed by the above statutes.

Ex parte Clark, 130 S. C. 501, 126 S. E. 137;
Gainey v. *Anderson,* 87 S. C. 47; 68 S. E. 888;
Moon v. *Bruce,* 63 S. C. 126, 40 S. E. 1030;
McKenzie v. *Sifford,* 52 S. C. 104, 29 S. E. 388.

The first question presented to this Court is whether or not, with these established modes for barring dower fixed by law, can a court by judicial decree in an action against her husband for specific performance force a wife to *involuntarily relinquish* her dower without her consent, over her objection, without violating the inhibition of Section 1, of the 14th Amendment to the Federal Constitution, against taking one's property without due process of law and in denial of the equal protection of the law?

In the "Argument" hereinbelow, we shall demonstrate that no prior decision in South Carolina, or elsewhere, for that matter, has done this. The sole matter that the reported cases, as far as we know, have had any conflict about in cases of this kind is the question whether there shall be an abatement of the purchase money because of the dower, or an indemnity against it, except that outstanding

authorities such as the Circuit Court of Appeals of the District of Columbia in *Reilly* v. *Cullinane,* 287 Fed. 994, have held that the wife's refusal to renounce the dower defeats the action for specific performance entirely.

That the question now presented is a substantial Federal question flows clearly from two propositions:

(a) The wife having never signed the contract, her private property rights have been taken for the private use of enriching a wealthy corporation without her consent.

See 12 C. J. 1252, sec. 1042; and compare with the pronouncement of this Court in *Holden* v. *Hardy,* 169 U. S. 366, 391; 42 L. Ed. 780, 790 as follows:

> "Recognizing the difficulty in defining, with exactness the phrase 'due process of law', it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's (woman's) property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

(b) This has been a taking of one person's property and giving it to another, "contrary to settled usages and modes of procedure." Compare 16 C. J. S. 1375, sec. 647 and *Ochoa* v. *Hernandez Y. Morales,* 230 U. S. 139, 161, 57 L. Ed. 1427, 1437, 33 S. Ct. 1033.

The requirements of due process were not satisfied merely because Mrs. McCoy was brought into court and given an opportunity to be heard by that agency of the State. "Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process

of law regard must be had to substance, not to form." *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 234, 235; 41 L. Ed. 979, 984; 17 S. Ct. 581; *Fayerweather* v. *Ritch,* 195 U. S. 276, 297; 49 L. Ed. 193, 209; 25 S. Ct. 58.

The courts may not through judicial decrees violate the due process or equal protection of the laws clauses of the United States Constitution. *Scott* v. *McNeal,* 154 U. S. 34, 35, 38 L. Ed. 896, 897, 14 S. Ct. Rep. 1108; *Chicago, B. and Q. R. Co.* v. *Chicago, supra;* 6 R. C. L. 373 and R. C. L. Perm. Supp. p. 1701; also *Mooney* v. *Holohan,* 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406.

Rights of property which have been created by the common law can not be taken away without due process. *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 50, 56 L. Ed. 327, 346, 32 S. Ct. 169.

The decision of the State Court is not in accord with the applicable decision of this Court in *Sykes* v. *Chadwick,* 18 Wall. 141, 21 L. Ed. 824, and appears also to conflict with *Herbert* v. *Wren,* 7 Cranch 370, 3 L. Ed. 374. Compare it, too, with *Talbot* v. *Talbot,* 14 R. I. 57, holding unconstitutional a State statute which attempted to empower a court, on application of the owner of the estate in fee, to give security for the payment of the annual value of the dower, and thereby debar it, and with *Walker* v. *Bennett,* 152 A. 9, 107 N. J. Eq. 151, and *Wheeler* v. *Kirtland,* 27 N. J. Eq. 534, to the effect that such interests are not subject to impairment by statute, and are within the protection of the constitution.

Mrs. McCoy pleaded the Federal questions as soon as she was brought into court. By means of her demurrer to the amended complaint and the argument thereof by her Counsel she raised them in due time. See what the trial judge said in his "Supplemental Order" of August 23, 1943, appearing on pages 9 and 10 of the record. She preserved her

right by the first exception on appeal to the Supreme Court (R. 168, 169). The court itself after deciding the Federal issue adversely to this petitioner, also said:

> "One of the supposed issues presented is whether the constitutional questions raised, relating also to the Federal Constitution, have been preserved for possible review by the Supreme Court of the United States, if sought by appellants. Of course, our opinion is our own and does not bind that high Court, *but we think that such questions are sufficiently in the record for the purpose stated.*" (Italics added) (R. 425):

Mrs. McCoy pleaded fraud in her answer (R. 13 & 14). The plaintiff corporation demurred to this defense (R. 15 & 16). The demurrer was sustained by the Circuit Judge (R. 18); although resisted on grounds under the Federal Constitution raised at the first time it was possible to raise them. These Federal grounds were raised before the Supreme Court under the 2nd Exception on the 3rd Appeal (R. 169). The record admits that each and every point made by the exceptions was made and fully argued in the court below (R. 168). Moreover, the decisions of the Supreme Court shows that the constitutional points were duly made and preserved, and that the court passed on them.

The sustaining of plaintiff's demurrer to this defense of Mrs. McCoy's answer and the affirmance thereof by the Supreme Court (R. 18, 423, 428) is clearly not in accord with the applicable decisions of this Court in numerous cases holding that "no one shall be condemned in his person or property without an opportunity of being heard in his own defense," such as *Holden* v. *Hardy,* 169 U. S. 366, 391, 42 L. Ed. 780, 790, 18 S. Ct. 383; and *Ochoa* v. *Hernandez Y. Morales,* 230 U. S. 139, 161, 57 L. Ed. 1427, 1437, 33 S. Ct. 1033.

Constitutional rights can not be stricken down by arbitrarily striking out pleadings seeking to present such ques-

tions. *Kipley* v. *Illinois,* 170 U. S. 182, 42 L. ed. 998, 18 S. Ct. 550.

The next substantial Federal question presented by this record is whether ruling the husband, Addison E. McCoy, out as a litigant under the circumstances presented here, and that without notice, did not have the effect of taking away his property without due process of law as guaranteed by the 14th Amendment to the Federal Constitution?

After the remanding of the case to the Circuit Court by the 2nd Appellate decision, an amended Summons and Complaint were served on the Petitioner Addison E. McCoy, which required him to Answer the Amended Complaint on pain of default; pursuant to which he filed a full answer to the merits (R. 4). *There was no notice of a motion to strike this out or demurrer thereto.* But, when the matter came before Circuit Judge Gaston on motions to refer to a Special Referee, or to frame issues to a jury; the judge suddenly, and without other notice, ruled Addison E. McCoy out of the case and denied him any status as a litigant (R. 17). This was Addison's first opportunity to resist this action by the court on the ground that it denied him due process of law under the 14th Amendment to the U. S. Constitution; but he did then so resist it (R. 16). He further challenged this ruling on the Federal ground by the 3rd Exception on the next ensuing appeal (R. 170). The record shows that all points made by the exceptions were made and duly argued in the court below. The last opinion by the State Supreme Court expressly concedes that the Federal Questions were duly made and preserved (R. 425). The Court overruled his plea, thereby passing on the Federal Question adversely to him, which is the basis of its being set up here.

The Order of October 4th, 1943 (R. 16), was tantamount to striking out McCoy's answer to the Amended Complaint;

whereas that matter was not before the court, no demurrer or motion to strike it having been served. We respectfully submit that it was a denial of due process to have in effect stricken out the answer of Addison E. McCoy on motions of that kind, and outside of their scope. *Coogler* v. *California Insurance Co.*, 192 S. C. 54, 5 S. E. (2nd) 459. Due process does not permit a judgment against defendant which is not supported by plaintiff's petition. *In re Peek*, 60 N. E. 775, 167 N. Y. 391, 53 L. R. A. 888.

The plaintiff treated Addison E. McCoy as a litigant by serving upon him the Amended Summons and Complaint.

Addison E. McCoy had been given the status by those parts of the decision of the Supreme Court filed June 14th, 1943, 203 S. C. 59, —; 26 S. E. (2nd) 175, 179, as follows:

> (1) Wherein the Court said that the suggested procedure of making Mrs. McCoy a party will perhaps "give rise to an opportunity to defeat the decree of specific performance by establishing a value for the property in question which might give the inchoate right of dower a value so far in excess of the proportionate part of the contract price so as to deprive the respondent of the benefit of its contract". (R. 411).
>
> (2) "If in the further stages of the controversy, there can be evolved a method of computation that can be shown to be more equitable *in the light of the particular facts of this case* than either of the rules hereinbefore referred to, the case is open for further consideration of that particular problem. *In such further consideration, the appellant, the respondent, and the appellant's wife each will be entitled to be fully heard.*" (Emphasis added.) (R. 413).

The testimony of the professional witnesses as to the value of the limestone deposit, which was the only evidence to which weight should have been given, shows that a value has been established for the property in question that gives the inchoate right of dower a value so far in excess of the

proportionate part of the contract price so as to deprive the respondent of the benefit of its contract. We can not conceive how this result could be enforced without recognizing Addison E. McCoy as a litigant. If, for example, the evidence shows that the limestone bed is worth more than $60,000.00 and the rule of 1-6 for the dower be applied, then $10,000.00 would have to be set aside for the dower, which would leave Addison E. McCoy nothing for his property and the contract would be defeated, and the Court would be obliged to rescind it, and restore him to its possession.

The Court relieved itself from the embarrassment of this situation by disregarding the only evidence to which weight should have been given (as the authorities hereinafter cited will show) and arbitrarily fixing a value of the property at the contract price; but even if this be said to be a non-Federal ground of decision, the holding is so utterly without any fair or substantial support and so plainly untenable that Federal review can not be prevented, there being other admittedly Federal Grounds involved in the case. *Ward* v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751; *Creswill* v. *Grand Lodge K. of P.*, 225 U. S. 246, 261, 50 L. ed. 1074, 1080, 32 S. Ct. 822; *Terre Haute and I. R. Co.* v. *Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 S. Ct. 767.

Further statutory and constitutional provisions have become involved to sustain the jurisdiction of this Court because of points made in the Circuit and Supreme Courts of South Carolina on behalf of the defendant Addison E. McCoy. Promptly following the first decision of the State Supreme Court, and, in order to respectfully obey it as best he could in view of his wife's refusal, without waiving his constitutional rights which it was earnestly felt had been invaded by Court action that was having the effect of forcing from him immensely valuable property on an

evaluation at $10,000.00 while he had in hand a formally executed, *bona fide* offer for manufacturing purposes from a first-rate cement manufacturer of $25,000.00 for the property; on December 30, 1942, appellant duly executed a fee simple general warranty deed for the land to the plaintiff. This deed was duly tendered to the attorney for the plaintiff (R. 208) but was refused. Accompanying such tender was a notice of protest, setting out that the proffer was made out of respect for the judgment of the Court, but reserving all manner of exception thereto, and protesting that the defendant by the judgment of the Court has been and is being deprived of his property without due process of law and in denial of the equal protection of the laws as guaranteed by the Federal Constitution, in certain particulars which are specified in the protest, and will be more fully argued further on in this brief.

It is very apparent that the plaintiff did not regard the judicial proceedings ended by the first judgment of the Supreme Court. This is so, because on January 2, 1943, Counsel for the plaintiff served counsel for appellant with notice of a motion before Judge Mann for further relief. (R. 194). The matter of the dower was certainly not settled, and was expressly left open by the Supreme Court.

No judgment is final that does not terminate the litigation.

St. Clair County v. *Livingston,* 18 Wall. 629, 21 L. ed. 813.

Heike v. *United States,* 217 U. S. 423, 30 S. Ct. 539, 54 L. ed. 821.

Luxton v. *North River Bridge Company,* 147 U. S. 337, 13 S. Ct. 356, 37 L. ed. 194.

Chicago G. W. Co. v. *Basham,* 249 U. S. 164, 39 S. Ct. 213, 63 L. ed. 534.

To be final it must have disposed of the whole matter in controversy.

Young v. *Smith*, 15 Pet. 287, 10 L. ed. 741.

And the decree is not final, although it may settle the equities of the bill.

Lodge v. *Twell*, 135 U. S. 232, 10 S. Ct. 745, 34 L. ed. 153.

Clark v. *Roller*, 199 U. S. 541, 26 S. Ct. 141, 50 L. ed. 300.

Plaintiff's notice set the hearing for January 9, 1943; and, before that time, on January 5, 1943, Counsel for the defendant-appellant served upon the attorney for the plaintiff, by way of return to the said Notice, a pleading styled "Petition, Setting Forth Grounds in Opposition to Plaintiff's Motion for Order and Motion by Defendant for Relief." (R. 195).

This petition pleads for the first time it could be effectively pleaded that the Decree of July 6, 1942 and the first judgment of the State Supreme Court filed December 21, 1942 would have the effect of depriving the petitioner Addison E. McCoy of his property without due process of law and in denial to him of the equal protection of the laws as guaranteed by Article XIV, Section 1, of the Amendments to the Constitution of the United States for the reasons and upon the grounds set forth in the Notice attached (R. 199). The notice raised, *inter alia*, the issue that the proposed mortgage ordered by the Court to secure a part of the purchase money against the dower contains provisions that were violative of the Federal Constitutional rights of Addison E. McCoy. This contention being overruled by the Circuit Court was made the subject of Exception 6 on the 2nd Appeal (R. 223, 224).

The Court erred, it is respectfully submitted, in ordering the bond and mortgage to provide as follows:

> "*And Further,* that in the event the said wife survives the Defendant, the Plaintiff will, upon death of Defendant, pay the said sum to his wife with any accrued interest."

This is error, because in the event of Defendant's wife surviving him, the said sum will then become the property of the estate of this defendant, due to his executors or administrators, because of the liability of his estate upon the general warranty in his deed by reason of the vesting of said dower; and, as a wife under the Constitution and laws of South Carolina, enjoys a separate estate from her husband, the attempt of the Court to thus illegally deprive the Appellant's estate of said money is to violate the provisions of Article XIV of the Constitution of the United States to the effect that no State shall deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In no sense of the word would the abated amount secured by the mortgage belong to Mrs. McCoy.

Under Article 17, Section 9, of the Constitution of South Carolina, 1895, a married woman enjoys a separate estate from her husband. Therefore, the attempt of the order of January 14, 1943, to illegally deprive his estate of this money and give it to her clearly violates the Constitution. A. E. McCoy has certainly not given his consent; and throughout his Counsel has contested this unlawful appropriation of that which belongs to him. (Authorities, *supra*). 12 C. J. 1252, Sec. 1042, and *Holden* v. *Hardy, supra.*

Jurisdiction of this honorable Supreme Court of the United States on the basis of a substantial Federal question

is also here presented in the fact that the State Supreme Court failed to decide a most important matter presented to it, to wit: the issue of fraud as claimed by the appellant McCoy.

Article 5, Section 8, of the S. C. State Constitution of 1895, provides:

> "When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in the cause and fairly arising on the record of the case shall be considered and decided, and the reason thereof shall be concisely and briefly stated in writing and preserved with the record of the case."

To similar tenor and effect is Section 27 of the Code of South Carolina, 1942, Volume 1.

The question is that in view of these requirements did not the failure of the Supreme Court to decide a vital point made by exception have the effect of depriving this appellant of his property without due process of law and in denial of the equal protection of the laws in violation of Section 1, of the 14th Amendment to the Federal Constitution?

Exception 8 on the second appeal (R. 225) specifies the point.

Where the law gives a party an appeal, he has the right to the judgment of the appellate court on every question arising in the case.

Post v. *Jones,* 19 How. 150, 160, 15 L. ed. 618.

These constitutional and statutory provisions by their very language are mandatory and the obligatory nature has not been questioned by the Courts of South Carolina, although the constitutional provision has been averted to or considered in the cases of *Garret* v. *Weinberg,* 59 S. C. 162, 37 S. E. 51; *Jones* v. *Charleston, etc., Railroad Company,* 65 S. C. 410, 43 S. E. 884; *Wilcox* v. *Southern Realty*

Company, 91 S. C. 71, 74 S. E. 122; and the *State* v. *Meares*, 60 S. C. 527, 39 S. E. 245.

In *East Dayton Lumber Co.* v. *Mutual Home & Savings Association*, 123 Ohio St. 342, 175 N. E. 593, it was held that the provisions of a similar statute are mandatory; and the Supreme Court of Ohio observed that the Court of Appeals made a general finding, reversed its judgment and remanded the case to it.

William Cramp Sons v. *Curtiss Turbine Co.*, 228 U. S. 645, 33 S. Ct. 722, 57 L. ed. 1003, was a case where a Federal District Judge had given a *pro forma* decree without expressing an opinion and then sat in the Circuit Court of Appeals reviewing the decree, and the Supreme Court allowed a writ of certiorari.

In the Indiana case of *Hunter* v. *Cleveland, C. C. & St. L. Ry.*, 174 N. E. 287, the appellate court purported to decide the case by mere entry reading as follows: "Per Curiam. Affirmed." Appellants requested the appellate court to state reasons why it had affirmed the decision of the trial court, which petition was overruled. Appellants then filed in the Supreme Court of Indiana a petition to transfer the case to the Supreme Court. The court said:

> "It follows from what has been stated that the parties are entitled to a decision and judgment herein by the appellate court in the manner directed by Section 5, Art. 7, Constitution 1851, Section 172, Burn's 1926, and Section 1351, Burn's 1926, that no such judgment has been rendered, and that the cause is still pending in the appellate court for proper decision."

In *Fayerweather* v. *Ritch*, 195 U. S. 276, 49 L. ed. 193 a will was involved. The lower Court of New York State made a decree in which there was no formal finding of facts of the specific claims of certain relatives of the testator that

releases which had been executed by them barring them from sharing in the estate had been fraudulently obtained. On appeal the judgment was affirmed by the State Supreme Court, and there was another appeal, which also affirmed. (37 L. R. A. 305). A motion was made in the appellate Court to amend the remittitur so as to direct the lower Court to consider the matter of the releases and determine whether they were valid or invalid. The motion was denied.

After these proceedings, the relatives instituted suit in the Circuit Court of the United States, alleging the proceedings in the State Court, and that the Court made its decisions without passing on that issue.

It was also pleaded that appeals were taken and the Supreme Court of the State held and determined that the right of the parties to the property did require the consideration and decision of said issue, and *that it thereupon became the duty of said court pursuant to due process of law, and the provisions of the Constitution of the State and of the United States to require and order that said issues be in fact considered, passed upon, and included in judgment by the trial court;* but that nevertheless the said court did not so require, but by various fictions of law imputed to said trial term and court below that it had determined said issue, which was alleged to be not true.

The U. S. Supreme Court on appeal to it in part said:

> "In *Chicago B. & Q. R. Co.*, v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. 581, we held that a judgment of a State court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into Court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (p. 234 L. ed. p. 983, Sup. Ct. Rep. 584):
>
> " 'But a State may not in any of its agencies, disregard the prohibtions of the 14th Amendment. Its

judicial authorities may keep within the letter of the Statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. etc.' ".

* * * * * * *

"It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed, that the fundamental question presented in the trial court of the State was the validity of those releases; that, notwithstanding this, that court came to its conclusion and rendered its judgment without any determination thereof; etc.

* * * * * * *

"Although these plaintiffs were parties to the proceedings in the State Court, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S. 266, 41 L. ed. 979, 17 Sup. Ct. Rep. 581."

The undecided matter about which we complain is that the Honorable Supreme Court of South Carolina did not decide the point raised by the fourth exception on the first appeal thereto, that the main basis upon which fraud was claimed by the defendant was that

"The plaintiff in procuring the option represented to the defendant that 'elbow room' was wanted inducing the defendant to believe that it was expanding plaintiff's large saw mill operation adjoining defendant's place, and beclouding and concealing from him

the vital fact of the presence under the surface of the property of a large and highly valuable deposit of limestone or marl," etc.

The following is the nearest approximation of the Court to the point in issue. We quote from the opinion (23 S. E. (2nd) 378, Headnotes 9 and 10, R. 395):

"While the rules of equity which we have hereinabove stated, as they relate to fraud and concealment on the part of a vendee, are generally recognized and accepted by the Courts, it is agreed that an informed vendee must limit himself to silence in order to escape the imputation of fraud. If in addition to the party's silence there is any statement, even in word or act on his part, which tends affirmatively to a suppression of the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, the line is overstepped, and the concealment becomes fraudulent.

"It is upon the foregoing principle of equity that the defendant largely relies, and he points to the following testimony as being conclusive to show fraud. When the defendant, Mr. McCoy, was being cross-examined, this testimony was elicited:

" 'Q. Counsel asked Mr. Miller if he did not tell you when he was trying to get the option, if he told you it (Atlantic Lime Corporation) was in the hands of the receivership?

" 'A. Yes. I asked him "How about that lime plant?" He said, "Don't think it will amount to anything, it is in the hands of the receiver." I had a vague idea about the lime plant.'

"It is argued that this testimony shows that Mr. Miller overstepped the line, affirmatively suppressed the truth, and was guilty of concealment amounting to fraud. But this deduction escapes us."

No wonder the deduction escaped; because there was no exception that hinged the charge of fraud upon the conversation about the lime plant.

What McCoy had claimed about fraud was (4th Exception, 1st appeal, R. 386):

> "that the undisputed evidence shows that the plaintiff in procuring the option represented to the defendant that "elbow room" was wanted, inducing the defendant to believe that it was for expanding plaintiff's large sawmill operation adjoining the defendant's place, and beclouding and concealing from him the vital fact of the presence under the surface of the property of a large and highly valuable deposit of limestone or marl (which was further concealed by failing to mention it, or the right to prospect for it on the place, in the option form prepared in advance by plaintiff, although the plaintiff soon thereafter surreptitiously trespassed on defendant's said property and bored for lime; all of which induced the defendant to give plaintiff the option at the grossly inadequate price of $17.85 per acre; although it was indisputably shown that plaintiff had advance knowledge of the existence of large lime deposits there and thereabouts and of the activities of the State Council of Defense in prospecting and procuring in that area options for lime purposes ranging from $50.00 to $400.00 per acre; and, as all this was unknown to defendant, the statements made by plaintiff had the effect in law and equity of creating a duty on the plaintiff of making a full disclosure of the facts, which were withheld in the knowledge that if revealed the option would not have been given."

The above was submitted to the State Court, and argued fully, as will appear hereinafter in this brief, with ample citation of authority to make out the case of fraud.

The short excerpt from the cross-examination of McCoy quoted by the court appears on page 357 of the record at folio 506, following McCoy's statement that he had never noticed the Atlantic Lime Plant, that if he had, he thought it was connected with the Lumber Plant, and was nothing concerning him. This lime plant was a small operation as

its Receiver, Mr. Cope, testified (R. 323) (f. 370), attracting so little attention that quite a few told him at a recent County Fair exhibit that they did not know there was a lime corporation in Orangeburg County (R. 327, f. 386).

It must be obvious that Counsel for McCoy would not rest the important issue of fraud on an isolated statement in his cross-examination, with the record teeming with evidence bearing directly on the matters presented by his exception above quoted; but the court disposed of it all with a redundancy.

This was made the subject of exception 8 on the 2nd Appeal (R. 225-226), which was met with a reprimand to Counsel about the length of appellant's brief, that was no longer than many another filed in that court (the Circuit Court itself in this very case made an Order about 29 printed pages in length) (R. 19 to 48); and, although Counsel for McCoy had no other intention than to present the matter with the utmost respect to the court, his plea was dismissed with an adjudication that his brief "raises issues which have already been conclusively disposed of on the first appeal, and encompasses critical remarks, some direct and some by way of implication about the rulings heretofore made by the Circuit Judge and by this Court in the present litigation" (R. 400). We will reproduce in the "Argument" here below what was said in that brief on this subject, in the confidence that, not only will this great Court find that the plea of fraud had been legally and equitably made out, but will acquit Counsel of having employed any attitude other than that of respect for the courts of our State. Indeed, when it became necessary again to preserve the points in the brief on the 3rd appeal, in line with the requirements of *Northern Pacific R. Co.* v. *Ellis*, 144 U. S. 458, 12 S. Ct. 724, 36 L. Ed. 504 as explained in *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 339, 16 S. Ct.

850, 852, 40 L. Ed. 991, Counsel respectfully explained to the court that it was not in any spirit of transgression of the court's holding that the points were being again raised, but merely to save them for the appellant in event the case ever reached the United States Supreme Court; and the brief assures the court "of our highest respect and unwillingness to transgress its decisions, and that we are respectfully submitting only what is believed to be the legal and constitutional right of the appellant."

It was not a matter that the court "*overlooked,*" to be brought to its attention by petition for rehearing; because as above shown, the court directly adverted to the subject. Your petitioner was obliged by the requirements of *Northern Pacific R. Co.* v. *Ellis, supra,* as explained in *Great Western Tel. Co.* v. *Burnham, supra,* to preserve his position again and again, and did so; for which reason it can not be argued that the Supreme Court of South Carolina did not have multiplied opportunities to have corrected any "oversight," had there been such; but the court, on the contrary, deliberately allowed its holding to stand, whereby the appellant has lost tremendously valuable property without being accorded, as we respectfully submit, "due process of law."

(b) *Dates of Judgments to be Reviewed.*

The judgments of the State Supreme Court which it is sought to have this Court review were entered, respectively,

(1st) December 21, 1942.
(2nd) June 14, 1943.
(3rd) July 13, 1944.

(c) *Statement of the Case.*

On or about July 11, 1941, L. E. Miller, President of the plaintiff, Holly Hill Lumber Company, Inc., approached the

defendant, Addison E. McCoy, and offered him $7,500.00 for the premises described in the complaint which offer was refused (R. 340). Within about four days thereafter he again came to the defendant and persistently endeavored to purchase the premises, raising the offer to ten thousand dollars. This offer was accepted and the option set forth in the complaint was executed and delivered (R. 343).

Miller never mentioned lime, the existence of which was unknown to appellant, and never asked the right to bore on McCoy's property (R. 341), and gave as his reason for the purchase that he wanted "elbow room for the sawmill" (R. 342): which induced the signing of the option.

McCoy's suspicions were first aroused when after that he visited the property and found holes on it that Miller had bored (R. 344). This brought to his attention that there was something being concealed from him (R. 344).

The little deposits or flakes of lime at each hole caused him to make inquiry, which finally revealed to him the activities of the State Defense Council prospecting for plant locations.

These revelations caused Mr. McCoy to make some borings himself at a considerable cost (R. 345) and this brought to light the presence of this extremely valuable lime deposit all over his property, which was duly analyzed (R. 383, 384) resulting in the indisputable proof that enormous values were involved, and that the plaintiff was about to take under its alleged contract property worth many times the option price.

(The following is quoted from appellant's brief on the 2nd appeal, commencing on page 41. After setting forth what the Supreme Court has said on this subject, which will not be repeated here, since it is given *supra,* the brief reads as follows, omitting the folio references because they

were changed in a reprint of the Transcript for the 3rd appeal.)

"No wonder the deduction escaped; because there was no exception that hinged the charge of fraud upon the conversation about the lime plant. That was a mere incidental and secondary matter. What Exception No. 4 on the first appeal really struck at was argued by us as follows:

> " 'The picture we have here is that of a tract of land adjacent to which is another tract, acquired in part by the plaintiff from the defendant off of this same property (R. 261, 262, 337) and on which for years the plaintiff has been operating a large and prosperous sawmill. When Mr. Miller approached Mr. McCoy, had he said nothing as to his purposes for the acquisition of the McCoy lands, the transaction would have been unimpeachable, notwithstanding McCoy's later discovery that the land has within its bosom an immensely valuable deposit of limestone. *But he spoke,* and said a great deal, much of which was confusing and tended to conceal his real purpose. One of the essential points of the conversation is similarly stated by both parties:
>
> " 'At (Page 275) we find that Miller was asked:
>
> " 'Q. When you were talking to Mr. McCoy about an option on this property, what did you tell him you wanted with it? A. I don't recall that I told him what I wanted. *I do recall that I told him I would like to have more elbow room.*"
>
> " 'Mr. McCoy testifying (R. 343), said:
>
> " 'Q. What reason did he give? A. Elbow room for the sawmill."
>
> " 'This induced the signing of the option. He did not mention lime nor that he had investigated and had previously found that the 50 acre tract he had bought off of the McCoy place had lime deposits (R. 271).
>
> " 'That the plaintiff had knowledge of the existence of the lime, which knowledge was not possessed by the

defendant (R. 337) is shown by the borings previously made by the plaintiff on the fifty acres it had already bought off the McCoy tract, a former integral part of it, immediately adjacent to the land described in the complaint. In fact it is admitted that the plaintiff had eighteen months before bored for lime on the fifty acres, and knew lime was deposited there (R. 270). Mr. Miller also admitted that he had made borings on their plant site, consisting of 146 acres. Also, in driving pilings across the swamp they observed when they struck the marl or lime the piling immediately slowed up. They found that to be true all the way across the swamp (R. 277 and 154). And the most outstanding fact of all is that two or three weeks after he got the option he confirmed these very obvious and indisputable evidences that the lime bed extended all over the remainder of the McCoy lands to which the option applied by secretively boring thereon, although the option gave him no right to do so.

" 'Mr. McCoy's suspicions were first aroused when he saw the holes Mr. Miller had bored on his place, each hole having about it little deposits of flakes of lime. The plaintiff's option gave the plaintiff no right to enter and bore on Mr. McCoy's property (R. 234). In this respect, it is to be sharply contrasted with the form of options that was used by the State Council of Defense in taking options from others (R. 377 to 381). This form was introduced in evidence as an exhibit. It specifically gave the right to enter and bore, which provision is conspicuously absent from the option form employed by the plaintiff in its dealings with this defendant; and that of itself is some evidence of concealment.

" 'The defendant is a resident of and engaged in the laundry business in the City of Orangeburg, thirty-five miles away from the land in question. There was nothing to draw his attention to or arouse his interest in the lime deposits. The plaintiff's mill, on the other hand, stood on the spot; and, as even the Referee says, L. E. Miller, President of the plaintiff company, ad-

mitted knowledge of the substrata of lime underlying the area in which the defendant's land is located. This general admission goes back ten or twelve years; but Miller also admitted a recent specific knowledge of the lime as the result of borings. The defendant, on the other hand, never in his life paid any attention to the Atlantic Lime Company plant, on which the Referee places so much importance. He thought it was connected with the lumber plant, nothing concerning him. It is half mile or a mile away from the McCoy property. From the McCoy place you can't see it on account of the mill and lumber yard which lies between. The first Mr. McCoy knew of it was after he gave the option.

" 'These circumstances, together with the advance information about the lime prospecting that the plaintiff indisputably got from the conference between Miller, the President of the plaintiff corporation, and Dr. W. P. Jacobs, Chairman of the South Carolina Defense Council (R. 300), prior to the option, all show the comparative knowledge of the plaintiff pitted against the ignorance of the defendant. That conference was on June 26th, 1941. The option was taken July 15th. Dr. Moore, of the Defense Council, who was prospecting that area for a good lime deposit also had contacted Mr. Miller prior to July 10th (R. 303). Dr. Moore disclosed to him the purposes of the Council and gave him a form of their options which the Council was taking on lime lands in that area with a price range from $50.00 per acre to $150.00. Dr. Moore testified that at the time he did not know Mr. McCoy. McCoy did not even know that the State Council of Defense existed.

" 'If it did not come from so eminent a source, the statement in the Referee's Report that the officers of the corporation were under no obligation to give defendant information that they did not have would seem to us to be mere prating. Of course, they were under no obligation to give defendant information that *they did not have;* but what of the information that they *did*

> have? With great industry they set forth alleged reasons for the purchase, which the Referee catalogues as six in number, including *"the desire for elbow room."* Why was the lime deposit on the defendant's land and the high prices at which the State Council of Defense was taking options on lime land totally absent from the reasons given the defendant for him to part with his place at the paltry sum of $17.85 per acre?' "

(Note: At this point the quotation from the appellant's brief on 2nd appeal enters into the citation and argument of authorities. As this is a "Statement of the Case" we will break the quotation here and continue it later on under our heading, "Argument").

Continuing, however, the present statement of the case, the appellant on the first appeal suggested to the court that his wife's refusal to renounce her dower made it impossible for him to perform his alleged contract to give good title to the property. As to this suggestion the Court said it would not attempt to then meet such a situation; but that if it should develop the parties would doubtless seek an appropriate remedy in the lower court. It did develop and plaintiff continued the proceedings by moving for further remedies in the cause. In obedience to the mandate of the court, but under protest, reserving all his rights, the defendant had tendered a deed without a renunciation of dower—all he could do. The notice of protest, as hereinabove shown, raised Federal constitutional questions; which, being overruled by the Circuit Court, were made the basis of exceptions on a second appeal. That appeal resulted in a remand to the lower court for further proceedings, including the bringing in of the wife, Mrs. Sara S. McCoy, as a party. The absolute barring of her dower by judicial decree in derogation of the statutes and decisions of the State; the denial to her of the right to show that the contract had been procured by fraud;

certain unconstitutional terms ordered included in the proposed mortgage securing part of the purchase money against her dower; the denial to Addison E. McCoy of his status as a litigant; and the court's passing over the real issue made about fraud, have all been above discussed in the "Jurisdictional Statement" of this brief, and need not here be repeated; but they were properly urged, and the points preserved, as the State Supreme Court itself says, as the basis of a claim that your petitioners have been deprived of their property without due process of law and in denial of the equal protection of the laws as guaranteed to them by the 14th Amendment to the U. S. Constitution; and their bed rock upon authority will be demonstrated *post* under the heading, "Argument."

Specification of Errors

1. The statute and common law of South Carolina having provided the exclusive machinery for the barring of the dower of a mentally competent wife by her separate examination by and voluntarily renouncing her dower before an officer competent to administer an oath, it was a violation of the due process and equal protection of the law clauses of the Fourteenth Amendment of the United States Constitution for the State courts to have barred such a dower by mere judicial decree in an action against the husband for specific performance of an alleged contract in which wife had not joined, and she having refused to give her consent to renounce the dower.

2. The action of the State courts in denying such wife the right to set up and prove fraud in the procurement of the alleged contract, which resulted in her dower right being taken away fro[illegible]er without her consent, was a taking of her property without due process of law and a denial to her of the equal protection of the laws in violation of the

Fourteenth Amendment, Section 1, to the Constitution of the United States.

3. This suit was originally brought against the husband alone for specific performance. On his appeal from an adverse decree, the State Supreme Court remanded the case for further proceedings; wherein the court said that its directing the wife to be made a party would perhaps give rise to an opportunity to defeat the decree by establishing a value for the property so far in excess of the proportionate part of the contract price as to deprive respondent of the benefit of its contract; and that in the further consideration of the method of computing the value of the dower the appellant, the respondent and the appellant's wife each would be entitled to be fully heard. Pursuant to this an amended summons, requiring him to answer, was served upon the husband; to which he duly filed answer setting up defenses, but the Circuit Court then made an order without notice denying the husband any further status as a litigant. It was contended by him that this order denied him due process of law and the equal protection of the laws in violation of the 14th Amendment to the United States Constitution; and it is now contended that its affirmance, does deny him such rights and privileges guaranteed by that Amendment.

4. In trying the matter of the value of this sub-strated deposit of limestone or marl, the issue was marked and definite as to the evidence offered by the respective sides. Plaintiff depended principally on lay witnesses, mostly farmers whose knowledge was limited to surface purposes, such as agriculture and timber; whereas the defendants relied on professional witnesses, such as mining engineers and scientists, who alone were competent. The valuation decided on ignored the latter, and set a figure that was so

lacking in any fair or substantial support in the competent evidence and in authority and reason that its non-Federal nature will not prevent a review by this honorable Court, there being other Federal questions involved.

5. The State Court's action of ordering a part of the purchase price set aside as an indemnity against the dower claim of Sara McCoy and securing it with a mortgage providing that if she survives her husband, the money be paid to her; deprives her husband of his property without due process of law, because that money will not belong to her, but his estate, on account of the latter's liability under the general warranty in his deed.

6. The judgments rendered in this cause are illegal since the petitioners have thereby been deprived of due process of the law and the equal protection of the laws as guaranteed by the Fourteenth Amendment, Section 1, of the United States Constitution; because the honorable Supreme Court of South Carolina did not decide a vital point raised by the fourth exception on the first appeal in this case, that the main basis upon which fraud was claimed by the defendant was that

> "The plaintiff in procuring the option represented to defendant that 'elbow room' was wanted inducing the defendant to believe that it was expanding plaintiff's large saw mill operation adjoining defendant's place, and beclouding and concealing from him the vital fact of the presence under the surface of the property of a large and highly valuable deposit of limestone or marl," etc.;

which point was made and definitely stated in the cause and fairly arose upon the record, but was not decided as required by Article V, Section 8, of the Constitution of South Carolina, and by Section 27 of its Code.

ARGUMENT

Summary As to Claim of Fraud

The references to the record above given will show that Addison E. McCoy owned 560 acres of land in Orangeburg County, South Carolina, which he was operating as a farm located about 35 miles from where he worked and lived in the City of Orangeburg. Miller, the President of the plaintiff company, whose plant was located on the spot, is shown by this record to have obtained advance knowledge that the defendant McCoy did not possess, not only of a vast and highly valuable deposit of limestone under the entire body of the McCoy land, but that the State Council of Defense was exploring the territory for suitable plant sites, which while at first seems to have been directed to cement plants, has resulted since in the establishment on property adjacent to McCoy's of a plant for the reduction of aluminum to cost as much as ten million dollars. Having said knowledge he induced McCoy to give him an option on his property upon representations that he wanted "elbow room," apparently for the expansion of his large sawmill industry on property adjacent to McCoy's; and with an industrious line of talk beclouded the issue, concealing the big fact of the limestone deposit. Defendant's theory of fraud is that having spoken, he brought upon himself the equitable duty of a full disclosure.

The Supreme Court of South Carolina in its first opinion in this case, 23 S. E. (2nd) 375, 378, 201 S. C. 427, —, Record, page 395 admits the *principle* upon which the petitioner McCoy predicates fraud, when the court says:

> "While the rules of equity which we have hereinabove stated, as they relate to fraud and concealment on the part of a vendee, are generally recognized and ac-

> cepted by the Courts, it is agreed that an informed vendee must limit himself to silence in order to escape the imputation of fraud. If in addition to the party's silence there is any statement, even in word or act on his part, which tends affirmatively to a suppression of the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, the line is over stepped, and the concealment becomes fraudulent."

This statement of the principle is exactly what we contend; but the Court left it without effect by adverting to a somewhat irrelevant conversation about the Atlantic Lime Plant not complained about in the exception submitted; and, as the Court elsewhere in the opinion negatives the idea that there was any fiduciary relationship between the parties or anything imposing a duty on the vendee to have disclosed its knowledge of the limestone bed and its great value, we respectfully submit to this Court the following authorities to demonstrate that the duty to disclose arose by implication of law by reason of what the plaintiff's representative said in negotiating the option. We trust the following argument on this subject will serve two wholesome purposes: (1) to demonstrate that legal and equitable fraud did exist in the procurement of this option; and (2), as above promised, to show that our brief on the second appeal, which was criticized by the Court, was a dispassionate, respectful plea, based upon unquestionable authorities, for the remedying of what the petitioner McCoy and his counsel believe to be a monstrous fraud; and yet the omission of the Court to decide the issue that was really raised by appellant's exception on the first appeal about this was left uncorrected, and this petitioner thereby deprived of his property without, we believe, "due process of law." For this second reason we herewith continue to quote from

our brief on this subject on the second appeal, leaving out such parts thereof as have been hereinabove already quoted or stated, to wit:

" '**Plaintiff having gone so far with the representations made, was legally and equitably duty bound to make a full disclosure.**

" ' "A statement or affirmation is not always necessary to constitute fraud; sometimes concealment of facts may be equally operative for that purpose. However, silence or nondisclosure, even as to material facts, does not of itself in every instance suffice to establish the existence of fraud. Silence or concealment as to a material fact, known to one party and unknown to the other, constitutes fraud, when the other elements requisite thereto exist, *if there is a duty arising from the circumstances, imposed on the former, to speak and disclose the truth.*". 66 C. J. 574, Sec. 123, (Emphasis added).

" 'This duty arises from known inequality of knowledge or access to information, 66 C. J. 575.

" ' " 'Although the relation of the parties are not such that any duty of disclosure in general exists, if, nevertheless, one of them undertakes voluntarily or in response to questioning to make representations to the other with respect to the land * * * he is under the duty to go ahead and make a full and complete disclosure of anything which he professes to reveal; and if he makes but a partial disclosure in that connection, concealing other pertinent material information, such concealment after partial disclosure is in violation of the duty which he has assumed, and is of such a character that fraud may be predicated thereon." 66 C. J. page 576, Sec. 126.

" 'In *Connor* v. *Craig,* 216 Fed. 729, 733, the Circuit Court of Appeals for the 4th Circuit, speaking through the

medium of Hon. Chas. A. Woods, formerly of our own State Supreme Court, said:

"The general rule is that a vendee is not bound to disclose his knowledge of the property. But since the rule rests on the presumption that the vendor knows his own property, the moment silence passes into suppression the region of bad faith is entered; *and a very small act, or very slight circumstances, will convert concealment into fraud. Conlan* v. *Sullivan,* 110 Cal. 624, 42 Pac. 1081; *Faxon* v. *Baldwin,* 136 Iowa 519, 114 N. W. 40. In *Turner* v. *Harvey,* Jacob, 187, Lord Eldon, speaking of the general rule that a vendee may remain silent says:

" ' "*But, a very little is sufficient to affect the application of that principle; if a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate.*". (Emphasis added).

" '*Bowden* v. *Jones,* (Texas-1940), 135 S. W. (2nd) 624, involved more than what we attempt to do here, to resist the effect of a mere executory contract, or option; but to cancel an executed contract, or deed, because the purchasers had geological information about the oil on that land which they concealed. A letter had been written to the proposed purchasers by a friend of the vendor asking how the land looked "structurally" (a term used in reference to oil) and what they would do with the property if it were theirs. While the Court sustained the deed because the answer was found to have been true, no material fact was withheld, and no false implication given, still the Court clearly sets forth the obligation of the puchasers not only to answer truly; but, "*answering truly, to do so in such a way as to imply no material false representation.*"

" 'The soul of the thing is expressed in one of the authorities cited by opposing counsel from C. J. Secundum to the

effect that the withholding of that which was not stated makes that which was stated false.

" 'In *Welborn* v. *Cobb,* 92 S. C. 384, 75 S. E. 691, 694, we find the following, to wit:

" 'The appellant requested the Court to charge the jury that, if he merely said to Cobb that his deed called for 138 acres, that would not be a misrepresentation. His Honor refused the instruction, on the ground that it would be a charge on the facts. In this there was no error, because a seller might say to a buyer, "my deed calls for so much," in such a way and under such circumstances as to create in the mind of the buyer the belief that the tract contained that many acres. If he should make such an assertion with the intention to create such a belief, knowing that the tract did not contain that many acres, he would be guilty of misrepresentation. One may be guilty of misrepresentation in law, as well as in morals, by purposely creating a false impression or belief in the mind of another, with the intention that he act upon it, without making any positive or literal false statement of fact. *The suppression of the truth, with misleading suggestions, may be as effective to create an erroneous or false impression as a direct falsehood.*' (Emphasis added).

" 'These principles are re-stated in *Southern Iron & Equipment Co.* v. *Rwy. Co.,* 151 S. C. 506, 521, 149 S. E. 271, and *Scott* v. *Newell,* 146 S. C. 385, 402, 144 S. E. 82. While the purchaser may be under no duty to reveal to the vendor the existence or probable presence of mineral deposits in the land bargained for, and mere silence with respect thereto may not impair the validity of the contract,—

" 'But the contrary result follows where such circumstances (creating a duty to diclose) exist and the existence of minerals or quarries is not revealed.' 66 C. J. 591.

"As to the future nature of the representations

"That the expressed desire for the property for 'elbow room' may imply a future use, or a future rather than a present sense, makes no difference on the case.

"In *Buhler* v. *Loftus* (Mont. 1917) 165 Pac. 601, 604, we find the following:

" 'The fact concerning which the statement is made, however, may be with reference to the future but so related to present existent conditions that its affirmation as a fact will constitute a fraudulent representation within the rule of the cases cited. On this subject we find this in the text of Mr. Pomeroy:

" 'That the fact, however, concerning which the statement is made is future, does not itself prevent the misrepresentation from being fraudulent. The statement of the matter in the future if affirmed as a fact, may amount to a fraudulent misrepresentation, as well as a statement of fact existing at present.' 2 Pomeroy's Eq. Jur. Sec. 848.

"*Lucas* v. *Long,* 94 A. 12, 125 Md. 420, although holding that the misrepresentation of a purchaser as to the purpose for which the property is wanted is not such fraud as will prevent specific performance quotes with approval from *Byrd* v. *Rautmon,* 85 Md. 414, 36 A. 1099, as follows:

> " 'The representation of the motive actuating a buyer cannot be more than a nude assertion *unless* it incorporates some false averment of a fact on which the other party relies, and ought to rely, and without which the contract, it is reasonable to infer, would not have been made, *or suppresses some fact, the knowledge of which it is reasonable to infer, would have made the party abstain from the contract altogether.*'
>
> " 'Kerr on Fraud and Mistake, page 188, while recognizing that a false representation of intentional use of property would not ordinarily entitle the lessor to

have the lease avoided, adds the following very pertinent statement:

" ' "But if the representation, though in form a representation as to a matter of intention, amounts in effect to a representation as to a matter of fact, relief may be had in equity."

"We respectfully submit that we can find nothing in the Supreme Court's opinion that really responded to the foregoing argument about fraud."

The various and sundry reasons advanced before the Court by plaintiff as to why they wanted to make this purchase are so absurd on their face that they only serve to bring out more clearly the concealment of the real purpose, which was to get the lime. That they wanted to buy a field costing as high as $10,000.00 merely to graze cattle, which they didn't even have then (f. 205) is preposterous on its face.

The lack of *bona fides* in this statement of alleged reasons is clearly shown by the evasion by Miller's partner, W. J. Colvin, when he was pressed under cross-examination at the last Circuit trial as to whether they would accept it, if plaintiff was offered a deed, dower properly renounced, to every right on that property *except the limestone*, and at a greatly reduced consideration (R. 90); which offer was also made in open court to Counsel for plaintiff and flatly rejected by him. (R. 167). The undisputed testimony showed that for long years the plaintiff has owned vast adjoining properties (R. 275) without means of ingress over the McCoy property to various fishing lakes on its property and for connecting the properties of the plaintiff lying around the defendant's tract. That was the condition when the plaintiff had large quantities of timber to cut and remove, which timber is not there now (f. 489). This shows that the palintiff never had any need for the McCoy

land. Otherwise, it would have purchased it several years ago when it was available at $3,500.00.

When it is remembered that the plaintiff could have purchased this property three or four years previously for as low as $3,500.00 (R. 264), the remarkable and sudden advance in the offer to $10,000.00 is in itself a suspicious fact.

Mr. Miller's statement that he would not take for the land what he was proposing to pay for it, if he could get it (f. 231) and his evasion of the question as to whether or not he would take $50,000.00 for it today, proves his grasp of the value of this property, and that he was playing for a big stake.

Summary of Questions in Relation to Dower

In the second and third appeals there arose the following questions in relation to the dower of Mr. McCoy's wife, who had refused to renounce it (R. 209), to wit:

(1) As to the terms of the proposed mortgage to secure against the dower.

(2) As to the power of the Court to divest the dower by decree.

(3) As to denying Mrs. McCoy the right to show fraud.

The factual basis of these questions has already been fully covered, since it developed as the respective steps in the litigation were taken.

(1)

In the "Jurisdictional Statement" we have fully argued the constitutional point involved about the objectionable terms in the proposed mortgage by which if the wife survives the withheld fund will be illegally given to her instead of to the estate of the husband to whom it shall belong because of his liability on the general warranty in his deed. We see no need to repeat here, but we refer the Court to the quotation from *Minge* v. *Green, post.*

(2)

The fact is that without her signature or consent, and over her objection the court has barred Mrs. McCoy's dower in an action for specific performance against her husband.

The practical effect of the holdings in the State Court in this case is this: A man whose wife refuses to renounce dower when he proposes to sell some of his real estate need not bother to procure her *voluntary* renunciation of dower before a Notary or other officer. All he has to do is to make a contract with someone else to sell the property to the latter, *without her signature.* The proposed purchaser brings suit for specific performance, and by joining the wife as a party has her dower valued, pays the money to the Clerk, and her dower stands forever barred! The possibilities of fraud are incalculable. *No reported case prior to this one supports any such proposition.*

It is true that cases like *Payne* v. *Melton,* 69 S. C. 370, 48 S. E. 277; *Wannamaker* v. *Brown,* 77 S. C. 64, 57 S. E. 665; and *Armstrong* v. *Henson,* 139 S. C. 156, 137 S. E. 439, have laid down a procedure by which a part of the purchase price was abated and secured by mortgage to protect against the vesting of the dower. But none of them force the wife to *involuntarily relinquish* her dower right. The mere fact that the cases provide for protection against the vesting of the dower shows on its face that the inchoate right of dower is preserved unimpaired.

That what is involved is an abatement of a part of the purchase price, and not a sale of the dower, is shown by the annotations to 46 A. L. R. page 749 (11-a). The case of *Minge* v. *Green,* 176 Ala. 343, 58 So. 381, is quoted from in the notes to 46 A. L. R. page 765 as follows:

> "The object in view is merely to indemnify the vendee against the conti-gent *future* assertion of the dower right, which will be accomplished by regarding

the following rules: (1) The amount of the reservation should be so much of the purchase price as the wife may presently appear to be entitled to under the law of the local jurisdiction prescribing the quantum of the dower estate. (2) If the doweress expectant die before her husband the amount reserved with legal interest to that date, should be forthwith paid to the vendor. (3) *If she survives, the amount reserved falls due upon her death and is then payable to the vendor's heirs or assigns,* with legal interest accruing during the vendor's lifetime. (4) The ultimate payment of the amount reserved should be secured by a decretal order making it a lien upon the land, or else by a mortgage on the land conditioned and payable as above prescribed" * * * (Emphasis added).

All of the cases we have come across, excepting only the present case, which allow specific performance where the wife will not renounce dower, show that a mere abatement and security against the dower is all that is contemplated, and not that the dower itself may be barred in this manner. Many of the cases are collated in the notes to 148 A. L. R. at page 293 *et. seq.,* where the instant case is annotated. The said cases show that such a decree of specific performance may require the vendor "to convey whatever interest in the property he may have, *with abatement from the purchase price of the value of his wife's dower interest if she refuses to join in the conveyance or similarly relinquish her right.*" (Italics added.) We may select from this collation, e.g. the following:

"In *Sininger* v. *Thurner* (1942) — Ohio App. —, 44 N. E. (2nd) 112, the court said: 'It seems that according to the majority rule, where a vendor contracts to convey a greater estate than he has he may be compelled to convey what he can *with an abatement* from the purchase price for the deficiency * * * This majority rule has been frequently applied to compel

a conveyance *subject to dower* with an abatement from the purchase price'."

Or, we may further quote from 148 A. L. R. page 294:

> "And Illustration 4, Am. Law Inst., Restatement of Contracts, Vol. 2, No. 365 is as follows: 'A contracts to convey a perfect title to Blackacre to B. A's wife, who has a dower interest in the land, refuses to join in the deed. B may properly be given a decree that A shall transfer all his interest in the land, with either an abatement in price measured by the difference in value caused by the nonconveyance of the dower interest or with sufficient indemnity against *future injury to B in case A's wife survives him and enforces her rights*'."

It seems never to have been dreamed that she could not enforce such rights. The only debatable ground between the numerous cases collated appears to be whether the relief should take the form of an abatement or an indemnity; with a strong following of authority that the purchaser is entitled to neither of these remedies, in fact the whole decree of specific performance is defeated in toto by the wife's refusal, as was decided by the court of Appeals of the District of Columbia in *Reilly* v. *Cullinane*, 287 Fed. 994; where the court observed (p. 998):

> "In addition, it should be said that a decree directing Cullinane to convey at a reduced price, or to indemnify the purchaser for his wife's right of dower, would not be a decree of specific performance, but a decree reforming the contract, a brand of relief not warranted by the pleadings or the facts. *Hawralty* v. *Warren*, 18 N. J. Eq. 124-128, 90 A. Dec. 613; *Clark* v. *Seirer*, 7 Watts (Pa.) 111, 112; *Barbour* v. *Hickey*, 2 App. D. C. 207-215, 24 L. R. A. 763; *Brife* v. *Reeves*, 36 App. D. C. 476-484."

This case has a strong accompaniment of authority in the very annotations to 46 A. L. R. referred to by the Supreme

Court of South Carolina in its third opinion in the present case. At pages 756 and 757 of those annotations this collation is cited to the effect that it is an established rule in many jurisdictions that a court of equity will not order specific performance at all, even with abatement of the purchase price, or by ordering the husband to give an indemnity against the future assertion of the dower right. The view is that the remedy at law (for damages) is adequate, and the vendee must be remitted to that remedy.

The error in the Supreme Court's interpretation of the Annotations to 148 A. L. R. is evident by a casual reference to page 294 thereof, stating that *Murray* v. *Holcomb* (1932) 243 Ky. 287, 47 S. W. (2nd) 1026 held that *although the contract could not be enforced against the vendor's wife, because she was not a party to it*, the vendor could be required to convey the property to the plaintiff on payment of the consideration provided in the option, less the present value of the potential right of dower of the vendor's wife, as fixed by the court". (Italics added.)

The statement of the South Carolina Supreme Court in its last opinion "that Courts have been divesting the dower interests of married women for many a day, in order to compel the specific performance of the contracts of husbands," etc., appears to be totally without foundation in authority. *Citations of any such decisions are noticeable by their absence.* It is strange that the court noted that the early English equity courts followed the practice of imprisoning the husband-vendor until his wife relented from her refusal to renounce, and yet totally ignored its own State's decision in *Kinsey Burden, Exor.* v. *McElmoyle*, 8 S. C. (Bailey's) Equity, 375, 379, which was cited to the Court. In that case there was a decree requiring a defendant to execute a deed, which he tendered without a renunciation of his wife's dower. He was attached for contempt of

court; but the attachment was dissolved, because the Court said that, under the circumstances, such a deed was all he could tender; "and the right of dower would be worth but little, if the court could leave the wife no alternative but to renounce it, or submit to the perpetual imprisonment of the husband. 'Good and sufficient titles' mean such as the husband was competent to make, and not such as by force *or persuasion* he could extort from his wife." (Italics added.) These considerations and the authorities herein cited all show the utter unsoundness of the Supreme Court's position that the wife's interest is not in fact relinquished, but only transferred from the real estate, of which she refuses to join in the conveyance, to the fund created by the Court to take its place. It is that very attempted involuntary transfer that violates the constitution; for she is entitled to her dower *in kind,* and to force it away from her without her consent is to take it for the use of another in violation of the 14th Amendment.

We respectfully submit that the annotations in 46 A. L. R. 748 and 148 A. L. R. 292 referred to by the Court will not sustain the Court. They vary only as to whether there shall be an abatement of the purchase price or an indemnity against the dower; but no case cited indicates the taking away of the ultimate right of the wife to her dower *in the land.* The fact of an abatement or an indemnity shows of itself that the right to the dower may be asserted.

There is likewise no comparison here to the situation provided for in Secs. 8597-8602 of the S. C. Code, which relate solely to divesting the dower of an *insane* woman—an emergency situation not here involved.

In the headnotes to 28 C. J. S. pg. 133, sec. 61 may be found the following:

> "Except as the rule is affected by statutory charges, inchoate dower can not be divested by a judicial sale

or decree, except where the sale is to satisfy a lien which existed before dower attached."

See also *Horde* v. *Landrum,* 5 S. C. 213.

"Still her right of dower is a valuable interest, which she can not be compelled to resign, and which the law very carefully protects from the control of her husband. When she does part with it an officer must examine her apart from her husband, to ascertain whether she does it freely and voluntarily." *Sykes* v. *Chadwick,* 85 U. S. (18 Wall.) 141, 145, 21 L. ed. 824, 825, 826.

"A court of Chancery cannot allow a part of the purchase money in lieu of dower, when the estate is sold, unless by consent of all parties interested" *Herbert* v. *Wren,* 3 L. Ed. 374 (Syllabus), 7 Cranch, 370.

In fact, it is so highly regarded by the law of South Carolina that the dower inchoate even before becoming consummate may be treated as a vested interest; which idea is sustained by the following quotation from *Brown* v. *Brown,* 94 S. C. 492, 494, 78 S. E. 447, to wit:

* * * "*Shell* v. *Duncan,* 31 S. C. 547 says: 'The inchoate right of dower has been treated as such a substantial right of property, as will afford a basis for an action to protect it. Its present value may be judicially ascertained and protected.' He cites authorities to sustain these propositions.

"In Park on Dower, 237, it is said to be 'a right attaching by implication of law, which although it may possibly never be called into effect (as where the wife dies in the lifetime of the husband) yet from the moment that the fact of *marriage and of seizin have occurred it is so fixed on the land* as to become a title paramount to that of any other person, claiming under the husband by a subsequent act. This language is quoted with approval in the case of *Cunningham* v. *Shannon,* 4 Rich. Eq. 135.

"In the case of *McCreery* v. *Davis,* 44 S. C. 195, the Court, in speaking of the right of dower, says: '*Although it is inchoate, yet it is a substantial right of property.*'" (Italics added to last quotation.)

Indeed, in this very case of *Holly Hill Lumber Company, Inc.,* v. *McCoy,* the Court said: (26 S. E. (2nd) 175, 177) "The dower right in South Carolina is a creature of the common law, *recognized, however by numerous statutory provisions relating to the same. See for example Code* (1942) *Secs.* 8578, *et seq.*"

These considerations clearly dissipate any distinctions between the dower inchoate and the dower consummate where fundamental constitutional rights are involved, and the power of the Court to take away this dower can be weighed in the same balance with the power of a legislature to take away a dower consummate.

In *Talbot* v. *Talbot,* 14 R. I. 57 (decided in 1883) a statute empowering the court, on application of the owner of the estate in fee, and after notice to the widow, to authorize said owner to give security to the widow for the payment of the annual value of the dower, and thereby relieve the estate of any charge or lien thereon on account of such dower (in other words debarring it) was held unconstitutional and void. This decision may be quoted from as follows:

> * * * "the question is whether it is within the power of the general assembly to take it (the dower) from her, *in invitum,* and transfer it to the owners of the fee upon their simply giving to her security for the payment of its annual value to her. Clearly not. It has been repeatedly decided that a legislature has no power to take A's vested estate, or any part of it, away from him and transfer it to B for private use, on B's paying or securing to him its value and yet that is exactly what is attempted to be done, with some little, circuity of proceeding by the provision above recited. Cooley

Constit. Limit. *357, *531; *Taylor v. Porter,* 4 Hill N. Y. 140; *Osborn v. Hart,* 24 Wisc. 89; *Sadler v. Langhan,* 34 Ala. 311; *White v. White,* 5 Barb. S. C. 474; *Bankhead v. Brown,* 25 Iowa 540; *Nesbit v. Trumbo,* 39 Ill. 110; *Wilkinson v. Leland,* 2 Peters 627, 653; 2 Kent. Comment. 340."

"Inchoate right of courtesy is vested interest in land not subject to impairment by statute." *Walker* v. *Bennett,* 152 A. 9, 107 N. J. Eq. 151.

Wheeler v. *Kirtland,* 27 N. J. Eq. 534 declares the inchoate right of dower to be a valuable interest in land, and brings it within the protection of the constitution.

(3)

Mrs. McCoy had a vital and direct interest in the matter as to whether or not the alleged contract was obtained by fraud; because, under the ruling of the Court, such contract has the effect of depriving her of a substantial and valuable property right (*Brown* v. *Brown, supra*). She was not a party to the contract, nor to the proceedings or judgments between Addison E. McCoy and plaintiff which exonerated plaintiff from fraud, and she was not bound by same; and has a right to offer, independently, evidence of fraud in her own defense and be heard in argument thereon; a denial of which denies her, we believe, due process of law and equal protection of the laws as guaranteed by the Federal Constitution.

Under the Constitution and laws of South Carolina a woman is a free person, and an independent legal entity from her husband.

It can not be said that she had such privity of estate with her husband as to be bound by a judgment to which he was a party and she was not; because the wife's right of dower is independent of the husband *and is against him. Tibbetts* v. *Langley Mfg. Co.,* 12 S. C. 465, 481. (She was

not a party to the present litigation during the stage when the issue of fraud was adjudicated against her husband's claims of fraud).

In this connection, it is respectfully submitted that his Honor, Judge Gaston, erred in ruling out the cross-examination of the plaintiff's witness Harvey, tending to show that plaintiff's hiding the real purpose for trying to acquire this property, which is for the limestone bed; which was excluded because the Court did not think the issue of fraud was before the Court. The colloquy about this cross-examination appears on pages 53 and 54 of the Transcript, beginning at folio 194. It was an important issue; because plaintiff's President, L. E. Miller, in his testimony on the first trial (R. 258, 259) (folio 112), gave numerous reasons as a blind why plaintiff wanted this property, so phased as to leave the inference that he was not after the limestone particularly. The Supreme Court on the first appeal seems to have given weight to these alleged reasons. The object of the cross-examination was to show that if Miller or his Company were offered the property for the purposes for which they claimed they wanted it, excepting only the limestone, they would decline to except the limestone—a test of the *bona fides* of their claims; which, it is respectfully submitted, Mrs. McCoy had the right to inject, because they are taking away from her a valuable property right on the basis of those claims.

Summary as to Depriving Addison E. McCoy of the Status of a Litigant

This is purely a constitutional question. Its solution is so bound around the matter as to whether this Court has jurisdiction of it that it had to be fully deployed and discussed in the "Jurisdictional Statement", and nothing could be added here, except to repeat, which we would avoid.

Summary of Matter of What Evidence of Value Should Be Given Weight

In addition to what we have said above on this issue we respectfully submit that in his "Final Order", Judge Gaston himself plainly shows (R. 32) that between the evidence offered by plaintiff and defendant, respectively, the issue is marked and definite. There is no middle ground under the evidence. The value of the land is either the one estimate or the other; depending on whether it is correct law to follow, as he did, the testimony of inexperts, mostly farmers, with knowledge only of the surface uses of the property, for agriculture, timber purposes or the like; or the evidence of experts of undoubted knowledge of the lime industry and of the values of a great deposit lying underground, together with what can be done with it on the markets of 1941, as well as of tomorrow.

As to what was the evidence which he should have followed, we quote as follows from *Miller* v. *Parr Shoals Power Co.*, 104 S. C. 129, 88 S. E. 374, 375:

> "The question is: How may the present value of a particular parcel of land be proven? *The value of a thing rests generally in opinion,* and the opinion rests on many and varying factors. In the instant case, for instance, the lands, overflowed and sobbed, might have one value for agriculture; another for the ponding of water upon; another in connection with a homestead; another if part of a very small or very large parcel; another if timbered or untimbered. *The actual sale of land does not always indicate its true value, if indeed such value may be known with scientific accuracy. Generally the best available proof of what land is worth is the opinion of those who know enough of the factors which must be a basis of the opinion, to express their judgment about it.*" (Italics added.)

His Honor, Judge Gaston, discounted the application of the *principles* above quoted to the case at bar; because, as

he said, in the *Miller* case the plaintiff claimed the land was worth $6,000 and the jury gave him $900.00, based on testimony of witnesses for the defendant as to the value of land in that community; and he draws the conclusion that the case upholds the testimony of landowners who are not experts. This deduction alone will serve to prove how clearly in error his Honor was in his concept of what sort of evidence should govern in the *McCoy* case. The witnesses adverted to in the *Miller* case did know enough of the factors there involved; the surface uses of the land for agriculture or the like. No such elements are involved here, except as an inconsequential incident; but property that requires scientific knowledge,—a substrated deposit of marl, convertible to many highly technical and commercial uses (See R. pp. 105 and 106) totally unknown to persons like those who witnessed for the defendant in the *Miller* case. And yet, the quoted principle applies: *the best available proof is the opinion of those who know enough* of the factors.

That it would be error to limit the valuation of land to its fitness for culture, such as most of the witnesses for plaintiff would do in this case, see *Chandler* v. *Geraty*, 10 S. C. 304.

Perhaps the outstanding case upon this subject is the decision of the United States Supreme Court in *Montana Ry. Co.* v. *Warren*, 137 U. S. 348, 34 L. Ed. 681, 11 S. Ct. Rep. 96, with which this decision is not in accord, and from which we quote as follows:

> "There remains for consideration but a single point, that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were not therefore the opinions of persons competent to testify. It appears that the land taken (in condemnation) was a strip running through

a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that possibility, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and upon the trial witnesses were permitted to testify to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called 'only a prospect', had a value fairly denominated a 'market value' may, as the Supreme Court of Montana well says, be affirmed from the fact such prospects are the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimation thereof. And yet uncertain and speculative as it is, such prospect has a market value * * *. *At best, evidence of value is largely a matter of opinion,* especially as to real estate. * * * The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go into the newer portions of our land, where settlements are recent and values formative and speculative. *Here, as elsewhere, we are driven to ask the opinion of those having superior knowledge in respect thereto.*" (Italics added.)

The above decision has been quoted from and followed by the Courts of this country.

Market value depends not wholly upon the use to which the property is being put, *but upon the use or uses to which it is available.*

City of Los Angeles v. *Hughes,* 262 P. 737, 739, citing *Hooker* v. *Railroad Co.,* 62 Vt. 47, 49; 19 A. 775; *Washburn* v. *Railroad Co.,* 59 Wis. 364, 378; 18 N. W. 328, 334.

Lewis, in his work on Eminent Domain, Vol. 2, page 1269, Section 725, tells us of an English case, *Rugby Portland Cement Company* v. *London etc. Ry. Co.* (1908) 2 K. B. 606, involving the value of a limestone quarry. The owners were engaged in manufacturing cement. It was held that they were entitled to its value to them, which was what they might be *expected* to make out of it by working it; and that the fact that the claimants had large quantities of other limestone should not affect the matter.

> "This is undeveloped property in a state of nature, and such property nearly always takes its value from its supposed future not yet realized. Compare *Shafo vs. United States,* 191 U. S. at page 357, 24 S. Ct. 114, 48 L. Ed. 211."

From *Atlantic Coast Line R. Co.* v. *United States* (C. C. A. 5th decided Jan. 13, 1943) 132 F. (2nd) 959, 964.

The value of oil and gas leases and minerals as well as real property may be proved by estimate, conclusion or opinion of a competent witness.

Brazos River Conservation & Reclamation Dist. v. *Costello* (Texas C. A. 1943), 169 S. W. (2nd) 977.

This case turned on the testimony of an engineer and geologist.

The Court quoted from *Thorn* v. *Dunn,* Tex. Civ. App., 94 S. W. (2nd) 1229, 1230, as follows:

> "Minerals in place are matters concerning which the ordinary person probably knows little as to the value, and their value is usually a matter for expert testi-

mony to explain to the jury, because not capable of being understood by the average person."

These authorities all point out that the only evidence that can be given weight is that of those witnesses who have shown themselves competent to judge the value of this limestone bed. Dr. F. H. H. Calhoun, Mr. Ellis C. Soper, Mr. Roy Reddie, and Mr. J. Lincoln Moore are those who have qualified. They have all seen this property, and are not only men equipped with the theory, but with a large practical experience in the development of such enterprises as cement and other plants making use of limestone. Mr. Reddie is at present operating a limestone quarry at Gaffney, South Carolina, which pays a royalty basis of three cents per ton (R. 123). He adds that had they known about the McCoy property, they would have taken it up on a royalty basis and paid three cents per ton and upwards, according to the grade of the material and the purpose. Dr. Calhoun fixes a fair royalty at 5 cents (R. 108).

As to the royalty basis, there is ample authority for applying that method of valuation.

The royalty basis of valuing land susceptible to mining minerals was recognized in *Trustees of Proprietors of Kingstone* v. *Lehigh Valley Coal Co.*, 241 Pa. 469, 88 Atl. 763, 49 LRA (NS) 557; in *Middle Creek Coal Co.* v. *Harris*, 265 S. W. 465, 205 Ky. 119; and *Falls Branch Coal Co.* v. *Proctor Coal Co.*, 262 S. W. 300, 203 Ky. 307, 37 A.L.R. 1172. See also *Kentucky Harlan Coal Co.* v. *Harlan Gas Coal Co.*, 53 S.W. (2nd) 538, 245 Ky. 234.

His Honor, Judge Gaston, cited a number of State cases on values; but they have no application whatever for the simple reason that none of them purported to value a technical thing such as is here involved, a mineral deposit; and they all related to lands in their normal uses on the surface for agriculture and the like. South Carolina is not a min-

ing State. There are comparatively few minerals here. Since the phosphate industry moved to Florida decades ago, there has been no occasion for decisions as to value of minerals. It has only been recently that the aluminum industry has forced to light the impressive value of the South Carolina limestone.

The relation of this limestone to the production of aluminum, a ten million dollar plant for the reduction of which is being erected on property adjacent to McCoy's (R. 153), gives it a National aspect, perhaps inter-National, one in which problems of interstate commerce will soon be involved; and so it behooves this honorable Court to consider now whether this arbitrary valuation made in this case is so without any fair or substantial support in the evidence or the applicable authorities that its non-Federal nature can not prevent a review by this Court with the other admittedly Federal grounds involved in the case.

Ward v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751; *Creswill* v. *Grand Lodge K. of P.*, 225 U. S. 246, 261, 50 L. ed. 1074, 1080, 32 S. Ct. 822; *Terre Haute and I. R. Co.* v. *Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 S. Ct. 767.

Conclusion.

Federal questions are apparent throughout this record. A valuable property right has been taken from a citizen without her signature and against her consent, and handed over to a wealthy private corporation for private use and profit in disregard of constitutional rights. Hearings and decisions on vital issues have been denied setting at naught the "due process" clause of the 14th Amendment. The State Court has in several respects, we believe, acted not in accord with the applicable decisions of this Court. A fraud has been upheld and an unconscionable bargain en-

forced. This situation has revolved around a question of how to value an immensely important mineral—limestone—that bears directly upon the production of such nationally used commodities as aluminum and plastics; so that this question of valuation must sooner or later protrude itself into matters of interstate commerce and taxation; which make it urgent for this Court to settle correctly and now this precedent of valuation. These matters give this case a National interest.

For these reasons and to remedy the gross injustice that has been done, petitioners pray that this honorable Court may exercise its discretion favorably by granting the writ of certiorari applied for herein.

Respectfully submitted,

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